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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
1998 Biennial Regulatory Review -)
Streamlining of Mass Media Applications,)
Rules, and Processes)
)
Policies and Rules Regarding)
Minority and Female Ownership of)
Mass Media Facilities)

MM Docket No. 98-43

MM Docket No. 94-149

To: The Commission

PETITION FOR RECONSIDERATION

INTRODUCTION

Calipatria Broadcasting Company, L.L.C. and Rancho Palos Verdes Broadcasters, Inc., (collectively "Petitioners"), by and through their counsel, and pursuant to Section 1.429 of the Commission's Rules, hereby file a Petition for Reconsideration ("Petition") of the Memorandum Opinion and Order issued in In the Matter of 1998 Biennial Regulatory Review- Streamlining of Mass Media Applications, Rules and Processes - Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, FCC 99-267, released October 6, 1999 ("MO&O").¹

Petitioners specifically request reconsideration of Paragraph 29 of the MO&O. By this Paragraph the Commission agreed to extend the life of construction permits under valid initial authorizations or extensions as of February 16, 1999.

In support of the Petition, Petitioners state as follows:

¹ This Petition is timely filed as the MO&O was published in the Federal Register on October 22, 1999. 64 Fed. Reg. 56974 (1999).

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BACKGROUND

THE FORMER RULES

Under the rules in effect before February 16, 1999, a license for the operation of a broadcast facility could not issue unless a construction permit had first been granted. 47 U.S.C. § 319. Construction permits allowed 18 months for radio and low-power television facilities and 24 months for television facilities to be completed following the grant of a permit. 47 C.F.R. 73.3598(b). Extensions of six to twelve months were granted upon a showing of cause. 47 C.F.R. 73.3534(b).

THE NEW RULES

On November 25, 1998, the Commission released a Report and Order in In the Matter of 1998 Biennial Regulatory Review- Streamlining of Mass Media Applications, Rules and Processes - Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, 13 FCC Rcd 23,056 (1998) (“Streamlining Order”).

By virtue of the Streamlining Order, effective February 16, 1999, there is now a nearly absolute three-year limit on the length of construction permits, with very limited allowances for extensions. Streamlining Order at ¶83. Under these new rules, the only circumstances sufficient to extend the three-year period are when the permittee has been encumbered by administrative review, judicial review, or an act of God. Id. Construction permits granted over three years ago and under a valid extension are now subject to automatic forfeiture if construction has not been completed by the expiration of the last extension. Streamlining Order ¶¶80, 84, 89(2).

THE MO&O

In the MO&O, the Commission amended the new rules contained in the Streamlining Order, providing permittees holding valid construction permits or extensions as of the effective date of the Streamlining Order, February 16, 1999, an extension of time before their construction permits will be automatically forfeited. The extension is either one year from the effective date of the MO&O or until the existing expiration date of the construction permit, whichever is later.²

PETITIONERS

Calipatria Broadcasting Company, L.L.C. ("Calipatria") is the permittee of Station KAJB(TV), Calipatria, California. On June 10, 1994, Calipatria's predecessor-in-interest was granted a construction permit by the Commission. An application requesting a transfer of control was granted on December 16, 1997, and this ownership change was consummated on January 9, 1998. Calipatria's construction permit expired one year from the consummation date of the transfer of control, January 9, 1999.

Thus, Calipatria's construction permit expired 38 days before the February 16, 1999 cut-off date contained in the MO&O. Calipatria filed for an extension of its construction permit on January 15, 1999. However, that application was improperly denied on February 11, 1999, five days before the February 16, 1999 cut-off date contained in the MO&O. Calipatria sought reconsideration of this denial within 30 days as required by the Commission's Rules. That petition is presently pending.

² Regarding the one-year extension, the MO&O was published in the Federal Register on October 22, 1999. An issue has arisen as to whether the extension is until October 23, 2000 or December 22, 2000. It is requested that the Commission clarify this issue.

Rancho Palos Verdes Broadcasters, Inc. ("RPVB") is the permittee of Station KRPA(TV), Rancho Palos Verdes, California. On July 22, 1985, RPVB was granted a construction permit by the Commission, which, after various extensions, expired on January 24, 1999.

Thus, RPVB's construction permit expired 23 days before the February 16, 1999 cut-off date contained in the MO&O. RPVB had filed for an extension of its construction permit on December 28, 1999. However, that application was improperly denied on February 12, 1999, four days before the February 16, 1999 cut-off date contained in the MO&O. RPVB sought reconsideration of this denial within 30 days as required by the Commission's Rules. That appeal is presently pending.

ARGUMENT

I THE COMMISSION ARBITRARILY AND CAPRICIOUSLY LIMITED THE RELIEF GRANTED IN THE MO&O

By its actions in the MO&O, the Commission drew a distinction between similarly situated parties based on mere happenstance. In so doing, the Commission failed to articulate any explanation for this decision to distinguish between similarly situated parties, as it is required to do by the Administrative Procedure Act ("APA"). Its action was arbitrary and capricious.

An agency is obligated to offer its reasons for treating similar parties or situations differently. Transactive Corp. v. United States, 91 F.3d 232 (D.C. Cir. 1996); ANR Pipeline Co. v. F.E.R.C., 71 F.3d 897 (D.C. Cir. 1995). No such reason is offered in the MO&O.

In the MO&O, the Commission stated, "[W]e will provide relief to permittees holding valid initial authorizations or extensions on February 16, 1999, the effective date of the

[Streamlining Order], including permittees whose authorizations have expired but for which forfeiture is not final.” MO&O, ¶29.³

Thus, the MO&O grants relief, in the form of an extension for construction permits set to expire imminently, to those holding valid construction permit authorizations or extensions as of February 16th. However, those whose permits had expired or who had been denied extensions of their construction permits within days of the February 16th cut-off date are denied the relief granted by the MO&O. The Commission failed to offer any explanation for this decision to distinguish between parties whose permits expired within days of each other. This failure to articulate any explanation for this disparate treatment of similarly situated parties renders the Commission’s decision arbitrary and capricious.

Calipatria’s construction permit expired a mere 38 days before the cut-off date for the MO&O’s relief. RPVB’s construction permit expired a mere 23 days before the cut-off date for the MO&O’s relief. Both had filed applications for extension, which were denied, respectively, five and four days before the February 16th cut-off date.⁴ Additionally, both Calipatria and RPVB filed for reconsideration of the FCC’s actions within 30 days of the denials of their applications for extension, as required by the Commission’s rules.

It is pure happenstance that Calipatria and RPVB’s permits expired when they did: if Calipatria and RPVB had been granted their last effective construction permit extensions mere

³ The language “including permittees whose authorizations have expired but for which forfeiture is not final” is sufficiently ambiguous to allow one to interpret it as extending relief to those who have appealed their construction permit forfeitures. Yet this is not the interpretation that the Commission is applying. The Commission’s interpretation is that the extension will be available only to those holding valid authorizations or extensions as of the February 16th cut-off date.

⁴ It is obvious that the FCC’s decisions in these cases were premised on the new rules coming into effect, not the merits of the applications before it.

weeks later, they would be able to take advantage of the relief granted by the MO&O. Yet, the Commission is utilizing, without explanation, this difference, which is created by mere happenstance, to decide which parties to extend the relief offered by the MO&O.

In the MO&O, the Commission stated that the construction permit extensions are being granted out of the concern that “some permittees may not have taken all actions necessary to meet their existing construction deadlines,” and to “ensure beyond any doubt that permittees who may in fact have invested significant time and money constructing facilities under the old rules and who are in imminent danger of losing their permits have a final opportunity to bring service to the public.” MO&O, ¶29. Thus, the Commission has displayed its clear intent to give construction permit holders ‘one last shot’ at meeting their deadlines and bringing service to the public. Yet the Commission has failed to announce why some should receive this last opportunity, and others should not, which result is clearly arbitrary and capricious.

Petitioners realize that distinctions must be drawn between parties. However, the APA requires articulation of the reasons for drawing such distinctions. The Commission’s reasons for offering the relief provided by the MO&O, elimination of uncertainty and protection of investments of time and money, are laudable. However the Commission’s failure to articulate an explanation for not extending this relief to similarly situated parties is not.

II PRACTICAL EFFECTS

The failure to account for the distinction drawn by the Commission is troubling in itself. But what is more troubling is the fact that mere happenstance will result in some parties seeing years of time, effort and money wasted.

The situation faced by RPVB is representative: RPVB has sought to construct an antenna on Santa Catalina Island, California, for some time now. However, due to environmental concerns, RPVB has had to secure approval from a multitude of organizations and agencies before construction could begin, including the State of California, the County of Los Angeles, and the Santa Catalina Conservancy, the private entity that controls land use on the island. Three years did not provide for RPVB, and would not provide for any reasonable permittee, enough time in which to secure the approval of all the necessary entities.

Yet the time, effort and money that RPVB has spent in securing approvals is lost due to the fact it did not have the good fortune to have its construction permit extension expire 23 days later, or it did not have its application for extension denied 5 days later. In the MO&O, the Commission stated its concern with protection of investments of time and money in construction permits. However, the Commission failed to act upon this concern in deciding which parties would be entitled to the MO&O's relief.

Petitioners request the Commission extend the relief granted by the MO&O to two additional groups: (1) those who had appeals pending, as of February 16th, of the denial of their applications for extensions of their construction permits, which denials occurred within 90 days of February 16, 1999; and (2) those who had the right to appeal denials of applications for extensions of their construction permits as of the MO&O's February 16th cut-off date, and duly exercised that right within the 30 days provided by the Commission's Rules.

These groups, as represented by Calipatria and RPVB, had clearly manifested, as of the February 16, 1999 effective date of the Streamlining Order, their active interest in completing construction under their permits, as evidenced by their having appealed denials of their

applications for extensions. By implementing the solution suggested by Petitioners, these parties will not, without reasonable explanation, be denied, by mere happenstance, the fruits of their active efforts, their time, and their money.

CONCLUSION

The Commission's drawing of a distinction, based on happenstance, between similarly situated parties without articulation of a reason therefor is clearly arbitrary and capricious in violation of the Administrative Procedure Act. In light of this arbitrary distinction, and its practical effects, reconsideration of the qualifications for obtaining the relief extended in the MO&O is proper in this matter.

Respectfully submitted,

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